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In the Supreme Court of the United States

OCTOBER TERM, 1977

JUANITA KREPS, SECRETARY OF COMMERCE, APPELLANT

v.

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinion of the district court, as amended (App. No. 77-~~1067~~ 1678, A) [1] is reported at 441 F. Supp. 955.

JURISDICTION

On November 2, 1977, the district court held unconstitutional Section 103(f)(2) of the Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116, 42 U.S.C. 6705(f)(2), and enjoined the Secretary of

[1] Several other parties have taken appeals from adverse portions of the court's order. See Nos. 77-1067 and 77-1078. All references to the district court's opinion will be to the appendix to the jurisdictional statement in No. 77-1078.

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Commerce from continuing to enforce the statute. Notice of appeal to this Court was filed on December 2, 1977 (App. , *infra,* pp. 1a–2a). The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

QUESTION PRESENTED

Whether Section 103(f)(2) of the Public Works Employment Act of 1977 and the regulations issued pursuant to the statute are valid under the Fifth Amendment and are consistent with Title VI of the Civil Rights Act of 1964.

STATUTE INVOLVED

Section 103(f)(2) of the Public Works Employment Act of 1977, Pub. L. 95–28, 91 Stat. 117, 42 U.S.C. 6705(f)(2) provides:

> Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term "minority business enterprise" means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

STATEMENT

In the summer of 1976, Congress enacted legislation designed to alleviate national unemployment and to stimulate the economy by distributing two billion dollars to state and local governments for public works projects. The legislation, entitled the Local Public Works Capital Development and Investment Act of 1976, Pub. L. 94–369, 90 Stat. 999, charged the Secretary of Commerce with the responsibility of dispensing the funds through the Economic Development Administration. In May 1977 Congress amended the 1976 Act by authorizing an additional four billion dollars for similar projects.

The new statute, entitled the Public Works Employment Act of 1977, made various changes in the 1976 Act, including the addition of Section 103(f)(2), quoted above.

The Secretary of Commerce subsequently issued regulations and guidelines to implement Section 103 (f)(2). In pertinent part, the regulations provide (13 C.F.R. 317.19(b), 42 Fed. Reg. 27434):

> (1) No grant shall be made under this part for any project unless at least ten percent of the amount of such grant will be expended for contracts with and/or supplies from minority business enterprises.
>
> (2) The restriction contained in paragraph (1) of this subsection will not apply to any grant for which the Assistant Secretary makes a determination that the ten percent set-aside cannot be filled by minority businesses located

> within a reasonable trade area determined in relation to the nature of the services or supplies intended to be procured.

On October 5, 1977, appellees—various contractors and associations representing contractors, subcontractors and suppliers in the California construction industry—filed this action in the United States District Court for the Central District of California seeking declaratory and injunctive relief. Specifically, appellees sought to bar the Secretary of Commerce and the defendant political subdivisions of the City and County of Los Angeles from enforcing Section 103 (f)(2) in the 65 grants approved by the Secretary for the Los Angeles area. At that time, all the grants authorized by the Act had been made, but no contracts had been let for any of the Los Angeles construction projects (App. No. 77–1078, pp. 9–10).

On November 2, 1977, the district court granted appellees' motion for summary judgment, holding Section 103(f)(2) and the Secretary's regulations unconstitutional. The court also held the statute and the regulations "invalid and illegal" for inconsistency with Title VI of the Civil Rights Act of 1964 (App. No. 77–1078, p. 30). As to constitutionality, the court held that the Act violated the Due Process Clause of the Fifth Amendment because it established a racial quota and did not advance a governmental interest unrelated to race. The Act was not properly remedial in nature, the court concluded, because, in the court's view, there was insufficient evidence of discrimination before Congress when it enacted Section 103(f)(2),

and no such evidence had been presented in the one-day hearing on the merits (App. No. 77–1078, p. 21). The court further concluded that underemployed minorities in the construction industry could be aided by racially neutral legislation having a less detrimental impact on non-minority contractors (App. No. 77–1078, p. 21). The court enjoined future enforcement of Section 103(f)(2) and the Secretary's regulations, but it stated that its order does not apply to funds previously granted by the Secretary or to any action taken by any of the defendants with respect to those funds (App. No. 77–1078, pp. 39–40).

THE QUESTION IS SUBSTANTIAL

The question presented by this case is substantial. The district court has held an Act of Congress facially unconstitutional on the ground that it established an impermissible racial classification, something that this Court has never done.[2] A number of courts have now considered the constitutionality of the Act challenged here, with divergent results. Three district courts have held the statute constitutional,[3] a num-

[2] In *Bolling* v. *Sharpe*, 347 U.S. 497, the Court upheld the appellants' claim that federal statutes applicable to the District of Columbia were unconstitutional as applied by District of Columbia school officials. In that case, the racial classification was not, as it is here, designed as a remedy for racial discrimination.

[3] *Associated General Contractors of Kansas* v. *Kreps*, D. Kan., C.A. 77–4218, February 9, 1978, appeal pending, C.A. 10, No. 78–1176; *Fullilove* v. *Kreps*, S.D. N.Y., C.A. 77–5786, December 19, 1977, appeal pending, C.A. 2, No. 78–6011; *Rhode Island Chapter, Associated General Contractors of America, Inc.* v. *Kreps*, D. R.I., C.A. 77–0676, February 6, 1978.

ber have denied preliminary injunctions against enforcement of the statute,[4] and one district court has held the statute unconstitutional as applied.[5]

The importance of the questions and the force of the arguments supporting the constitutionality of the statute (see cases cited in note 3, *supra*) would plainly warrant this Court's noting probable jurisdiction except for special circumstances obtaining here, which may call for a different disposition.

1. First, this case appears to be moot. As of the time the district court entered its judgment, the record reflected that the Economic Development Administration had obligated all the funds authorized and appropriated under the Act. Moreover, since the district court's order did not apply to the disposition of any of the funds already granted, all the contracts for the 65 projects in the Los Angeles area that were the subject of the appellees' suit have been let in compliance with Section 103(f)(2). Accordingly, there

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[4] *Constructors Association of Western Pennsylvania* v. *Kreps*, 441 F. Supp. 936 (W.D. Pa.), appeal pending, C.A. 3, No. 77-2335; *A. J. Raisch Paving Co.* v. *Kreps*, N.D. Cal., C.A. 77-2497, December 15, 1977 (appeal filed); *Ohio Contractors Association* v. *Economic Development Administration*, S.D. Ohio, C.A. 1-77-619, November 22, 1977, appeal pending C.A. 6, No. 78-3053; *Florida East Coast Chapter of Associated General Contractors of America, Inc.* v. *Secretary of Commerce*, S.D. Fla., C.A. 77-8351, November 3, 1977; *General Building Contractors Association, Inc.* v. Kreps, E.D. Pa., C.A. 77-3682, December 9, 1977; *Carolinas* 442 F. Supp. 392 (D.S.C.); *Montana Contractors Association* v. *Secretary of Commerce*, 439 F. Supp. 1331 (D. Mont.); *Michigan Chapter, Associated General Contractors of America, Inc.* v. *Kreps*, W.D. Mich., C.A. M-77-165, January 4, 1978.

[5] *Wright Farms Construction, Inc.* v. *Kreps*, D. Vt., C.A. 77-260, December 14, 1977.

BRANCH ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. v. Kreps,

is no apparent further case or controversy between the parties with respect to the subject matter of this action, and the case may therefore be moot. *Preiser* v. *Newkirk*, 422 U.S. 395; *Golden* v. ZWICKLER, 394 U.S. 103.

There are two possible grounds on which there could still be a live case or controversy concerning the application of Section 103(f)(2) to the 65 Los Angeles projects, neither of which appears from the record. First, if there are any subcontracts or supply contracts remaining to be let that would be affected by Section 103(f)(2) and the Secretary's regulations, some plaintiffs might have standing to seek to expand the district court's injunction to bar further application of the minority participation requirements. Since no contracts had been let at the time of the district court's judgment, however, the record does not reflect whether any plaintiff has standing to seek this relief. See *Warth* v. *Seldin*, 422 U.S. 490, 510–517.

Section 103(f)(2) might also have some future effect in this case if a minority subcontractor or supplier defaulted in the course of an ongoing project, since under the statute and regulations grantees are required to make their best efforts to ensure that the statute is complied with throughout the life of the project. If such a default occurred, and if the grantee proposed to re-engage a minority subcontractor or supplier, a plaintiff non-minority subcontractor or supplier might have standing to complain of the operation of the statute. This scenario, however, is wholly speculative, and is not "of sufficient immediacy and ripeness

to warrant judicial intervention." *Warth* v. *Seldin*, *supra*, 422 U.S. at 516.

Although the United States believes the statute is constitutional it is not clear on the record that a live controversy remains in this case. We therefore suggest that the Court remand the case to the district court to consider whether it has become moot.[6] See *White* v. *Regester*, 422 U.S. 935; *Indiana Employment Security Division* v. *Burney*, 409 U.S. 540; *North Carolina* v. *Rice*, 404 U.S. 244.

2. Even if the Court determines that this case should not be remanded to the district court for consideration of the question of mootness, the Court may wish to hold this case pending the disposition of *Regents of the University of California* v. *Bakke*, No. 76–811. Because this case involves an Act of Congress and concerns an expenditure program quite different from that at issue in the *Bakke* case, the result here may not be controlled by *Bakke*. Nonetheless, the issues in the two cases are sufficiently related that the Court's decision in *Bakke* may bear significantly on the question presented here and may call for reconsideration of this case by the district court in light of that decision.

3. In the alternative, the Court should note probable jurisdiction and set this case for argument. On the merits, the case presents substantial constitutional

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[6] That Congress may in the future authorize similar public works projects with similar minority preference provisions is not, without more, sufficient to avoid mootness. See *Preiser* v. *Newkirk*, *supra*, 422 U.S. at 402–403; *O'Shea* v. *Littleton*, 414 U.S. 488.

questions under the Fifth,[7] Thirteenth[8] and Fourteenth[9] amendments, in addition to the statutory question of the compatibility of the Act and regulations challenged here with Title VI of the Civil Rights Act of 1964. Moreover, this case raises the important question of Congress' constitutional authority to enact specific legislation designed to remedy forms of discrimination that have not proved responsive to more general legislative efforts.

CONCLUSION

For the reasons stated above, the judgment should be vacated and the case remanded to the district court to consider whether it has become moot. In the alternative, probable jurisdiction should be noted.[10]

Respectfully submitted.

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MARCH 1978.

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[7] See *Morton* v. *Mancari*, 417 U.S. 535, 551–552; *Bolling* v. *Sharpe*, 347 U.S. 497.

[8] See *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409.

[9] See *Katzenbach* v. *Morgan*, 384 U.S. 641.

[10] The Court may, however, wish to hold this case for disposition in light of the Court's decision in *Regents of the University of California* v. *Bakke*, No. 76–811.

APPENDIX

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United States District Court, Central District of California

Civ. No. CV 77–3738–AAH

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, A NONPROFIT CORPORATION; ENGINEERING CONTRACTORS ASSOCIATION, A NONPROFIT CORPORATION; AMERICAN SUBCONTRACTORS ASSOCIATION, A NONPROFIT CORPORATION; LOS ANGELES COUNTY CHAPTER, NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., A NONPROFIT CORPORATION; STEVE P. RADOS, INC., A CORPORATION; GRIFFITH COMPANY, A CORPORATION; GORDON H. BALL, INC., A CORPORATION; STODDARD ENTERPRISES, A SOLE PROPRIETORSHIP; AND GRANITE CONSTRUCTION COMPANY, A CORPORATION, PLAINTIFFS

v.

SECRETARY OF COMMERCE OF THE UNITED STATES DEPARTMENT OF COMMERCE; U.S. DEPARTMENT OF COMMERCE; LOS ANGELES COUNTY, A BODY CORPORATE AND POLITIC; LOS ANGELES COUNTY BOARD OF SUPERVISORS; LOS ANGELES FLOOD CONTROL DISTRICT; LOS ANGELES COUNTY ENGINEER; FACILITIES DEPARTMENT OF LOS ANGELES COUNTY; CITY OF LOS ANGELES, A MUNICIPAL CORPORATION; LOS ANGELES CITY COUNCIL; DEPARTMENT OF RECREATION AND PARKS OF THE CITY OF LOS ANGELES; DEPARTMENT OF PUBLIC WORKS OF THE CITY OF LOS ANGELES, DEFENDANTS

[2] Notice is hereby given that the Secretary of Commerce of the United States Department of Commerce and the United States Department of Commerce, defendants above-named appeal to the United States Supreme Court from the entire Summary Judgment for Declaratory and Injunctive Relief entered in this action on Novermber 2, 1977. This direct appeal to the United States Supreme Court is made pursuant to 28 U.S.C. § 1252.

Dated: This 2nd day of December, 1977.

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